United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

77-1045

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

LOUIS CIRILLO,

Appellant.

On Appeal from a Judgment of the United States District Court for the Southern District of New York

PETITION FOR REHEARING AND SUGGESTION OF APPROPRIATENESS FOR REHEARING EN BANC

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TABLE OF AUTHORITIES

Appellant Louis Cirillo respectfully requests this court to grant a rehearing and also suggests that this case is appropriate for a rehearing by the court en banc.

This motion is based on Rules 35(b) and 40, Fed. R. App. P. and upon a Memorandum of Points and Authorities which follows.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On April 28, 1977 this court filed an opinion affirming the order of the United States District Court for the Southern District of New York, the Honorable Edward Weinfeld, Judge, denying the motion to vacate the sentence of appellant as a second offender pursuant to 21 U.S.C. §§ 841 (b) (1) (A) and 851 (a) (1) and (b) on the ground that the information charging the earlier offense (second offender information) had not been filed prior to the trial of the second offense.[1] The defendant believes the court improperly applied the clearly erroneous doctrine to the facts and circumstances of this case and submits that upon proper review of the facts and the law the court should vacate the enhanced portion of the sentence. This court's opinion, as well as the opinion of the court below, casts a grave cloud

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1. The court expressly refused to decide whether the issue could be properly presented by a petition filed under 28 U.S.C. §2255.

upon the sanctity of court records and will doubtlessly produce a flood of litigation to impeach these records.

II. ARGUMENT

Point I

THE CLEARLY ERRONEOUS DOCTRINE WAS IMPROPERLY APPLIED TO THE FACTS AND CIRCUMSTANCES OF THIS CASE

This court correctly notes that the clerk's filing stamp shows the date of the filing of the second offender information to be April 21, 1972 and that the docket entry reflects the same date. The court also correctly relies on the docket records to establish April 17 as the commencement of the trial. Despite this documentary evidence, Judge Weinfeld, after an evidentary hearing, found that the second offender information was in fact filed on April 12. This court recites certain of the subsidiary findings of the lower court ostensibly in support of the filing date of April 12 and concludes that the ultimate finding is not clearly erroneous. It is noteworthy that this court does not share the skepticism of Judge Weinfeld as to the sanctity of court records. Indeed, this

skepticism arguably influenced the lower court to reach the conclusion that it did, thereby casting a cloud over the whole fact finding process.

The disposition of the case does not turn on any conflict of the evidence, nor proper inferences therefrom, nor, indeed, upon the demeanor of any of the witnesses. It turns exclusively on the standard to be applied in the impeachment of court records and upon the reliability of other court records clearly establishing April 21 as the correct filing date. Simply stated, the only basis for the court's finding of April 12 as the filing date is the belief that a transposition error occurred either in the use of the hand stamp or in the transcription of the docket entry. Indeed, Mr. Seymour at the sentencing advised the court, as follows:

> The information was in fact filed on April 12. The docket sheet has the date transposed as being April 21 ....

On the basis of this representation of the United States Attorney, the defense attorney did not object, the court directed that the court record of the filing date be corrected to April 12, 1972 and

enhanced the sentence accordingly, and defendant Cirillo failed to discover the true facts for four years.

Apparently the government still persists in the transposition error explanation -- although presently the transposition error occurs not on the docket sheet but on the filing date of the original copy, which Mr. Seymour never saw in 1972. The lower court adopts this theory and this court seemingly adheres to the suggestion.

Despite this elusive (and regrettably devious) pet theory which is put forth to account for the legality of enhancement of sentence, it cannot be accepted in view of other court records establishing the contrary proposition -- that is, unless these records are also corrected. The documentary evidence shows that on April 21 two other second offender informations were filed against two other defendants in related cases. See Brief for Appellant, p. 14. Indeed at one time the docket entries for the Cirillo case showed the entry of these two other second offender informations. The mistake was promptly

discovered and corrected. These two other informations could not have been filed on April 12 since they were served on April 17 (See Appendix, pp. 179 and 182). Service occurs before filing. It follows that all three were filed on the same date -- April 21. It is rather frustrating that this simple fact has eluded the prosecution and four judges.

The clearly erroneous doctrine can hurdle many barriers, but not the bastion of unimpeachable court records and common sense.

Point II

JUDGE WEINFELD'S DIRECTION AT SENTENCING DOES NOT DESTROY THE PRESUMPTION OF REGULARITY ATTACHING TO COURT RECORDS.

The court believes that the entry nunc pro tunc at the sentencing proceeding of the April 12 date corrected any irregularity in the filing date. This view overlooks and frustrates the statutory policy behind the filing date requirement (See United States v. Noland, 495 F.2d 525 (5th Cir.) cert. denied 419 U.S. 966 (1974), legitimates court action based on an erroneous representation of the United States

Attorney and an error in fact (See W.F. Sebel Co. v. Hesse, 214 F.2d 459 (10th Cir. 1954) (nunc pro tunc must have proper factual basis); 6A Mocre's Federal Practice, 2d edition §58.08) and penalizes defendant for a procedural irregularity in not interposing an objection without any hint of deliberate by-passing or waiver on his part (See for example, Fay v. Moia, 372 U.S. 391 (1963). Clearly, Mr. Krieger was lulled into a false sense of security. See Supp. Appendix, S-1 to S-5 (Affidavit of Albert J. Krieger).

The court notes the four years delay in bringing this collateral proceeding. The court should also note defense attorney's exception to Judge Weinfeld's refusal to allow defendant Cirillo to testify (Appendix, p. 58). He could have given testimony, if indeed it is relevant, as to the four year "delay".

The delay was brought about by the U.S. Attorney's representation and worked to the advantage of the government in permitting it to elicit habit testimony and testimony of reliance upon other unnamed

assistants. There is no conceivable advantage to be gained by defendant in delaying the collateral proceeding to reduce the enhanced portion of his sentence.

It is imperative for purposes of judicial administration that court records be presumed to be accurate. No court can long operate if every minute entry can be effectively challenged by an uncontested, gratuitous, self-serving statement of one of the litigants. In 1975, in the Southern District of New York, there were 1,278 criminal filings and 6,282 civil filings. After the court's opinion in U.S. v. Cirillo it would appear that each and every critical date in each and every one of the 7,560 cases can now be effectively rebutted by a bold statement of counsel that the clerk has erred.

It is perhaps ironic that the appellant is arguing for presumed regularity of the clerk's records whereas the United States Attorney is arguing contrary. Although the criminal defendant has always had an interest in accurate records being kept, as one approaches July 1, 1979, the defendant's interest increases dramatically. On July 1, 1979, the sanctions of the Speedy Trial

Act become effective. 18 U.S.C. 3162. For purposes of dismissal, the defendant, the Court, the United States Attorney and society in general must be able to determine whether the time restraints dictated by 18 U.S.C. 3161 have been violated. The heart of the Speedy Trial Act is the excludable time provisions of 18 U.S.C. 3161(h) and it is very possible that each criminal defendant will average five excludable time determinations. Under the court's opinion in U.S. v. Cirillo, it would appear that a litigant can successfully challenge the recording of excludable time with virtually no factual basis. It is maintained that the precedent set in U.S. v. Cirillo may cripple the administration of criminal justice in the Second Circuit. The Speedy Trial Act cannot be administrered if this case is not reconsidered and reversed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this court's opinion in United States v. Cirillo, No. 1059 Docket No. 77-1045, should be vacated and that this court grant defendant's petition for rehearing and reverse the order of the district court refusing to vacate the enhanced portion of defendant's sentence. The defendant also suggests pursuant to Rule 35(a) and (b) of the Appellate Rules of Procedure that this case is appropriate for a rehearing en banc.[2]

Respectfully Submitted,

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2. The full court will also be asked to consider the applicability of the Noland rule in this Circuit. United States v. Noland, supra; (filing of second offender information prior to trial date is a jurisdictional prerequisite to imposing an enhanced sentence.)

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COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,
- against -
LOUIS CIRILLO,
Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

That on the 11th *day of* May, *19* 77 *at* 1 St Andrews Plaza
New York, N.Y.

deponent served the annexed Petition *upon*

U.S Attyl- Southern Dist.
Robert B. Fiske, Jr.

the Appellee *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* attorney *herein.*

Sworn to before me, this 11th
day of May, *19* 77

Reuben Shearer
Reuben Shearer

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0118950
Qualified in New York County
Commission Expires March 30, 1979